SARJIT SINGH KAHIRA A

v.

STATE PUBLIC SERVICE COMMISSION, SARAWAK

HIGH COURT SABAH & SARAWAK, KUCHING B
LAU BEE LAN J
[ORIGINATING MOTION NO: KG 26-1990]
4 JUNE 2007

CIVIL PROCEDURE: *Costs - Application for review - Getting-up costs - Whether applicant in dismissal case entitled to costs before Board of Inquiry - Interest - Whether applicant entitled to interest from date of judgment until settlement - Rules of the High Court 1980, O. 59 r. 36(1)* C

The applicant was dismissed as an accounting officer by the State Public Service Commission (the respondent) and obtained an order of *certiorari* with costs by the High Court against the said dismissal. Both the appellate courts subsequently affirmed the High Court decision. In this instance, both parties applied, pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980, for review of the applicant's bill of costs for the amount of RM235,814.56 allowed by the deputy registrar ('DR'). The applicant urged the court to grant statutory interest from the date of judgment until final settlement whilst the respondent objected to item 119 of the bill which included getting-up costs before the Board of Inquiry. D E F

Held (dismissing applications for review):

(1) The court will only interfere with the decision of the taxing registrar if it can be clearly shown that the taxing registrar has made an obvious mistake or has exercised his discretion capriciously or mischievously or there are some error of principles. (para 3) G

(2) The applicant would not be entitled to costs before the Board of Inquiry as costs awarded in the High Court must be in relation to the proceedings in the High Court. Hence, to that extent, the DR erred when she stated that the applicant was entitled to getting up costs for the inquiry. (para 8) H

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(3) It would have been ideal if a time sheet or attendance slips were kept. However, a time sheet was not compulsory. The fact that no time sheet was prepared did not detract from the fact that time was spent in getting up for the various actions which the DR had given due regard to. (para 12)

(4) The DR did not err when she considered that there were many complicated issues of both facts and law involving extensive legal research and stated that the complexity of the matter was confirmed by the Deputy State Attorney-General. (para 13)

(5) The power to award or refuse interest is one of pure discretion. The court agreed with the respondent's submission that by awarding interest the court would condone the applicant's complaint in a letter addressed to one Mr Thomas of incompetence and negligence in not filing the Notice of Taxation for eight years. In the circumstances, the DR exercised her discretion judiciously in not awarding interest. (para 14)

Case(s) referred to:

Chin Shui Lan v. Liow Yuan Kung & Ors (OS No. T(24) of 16 of 1995) (Unreported) ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Damansara Jaya Sdn Bhd [1999] 7 CLJ 481 HC ***(refd)***

Lian Kim Lian v. Bajuria [1971] 1 MLJ 276 ***(refd)***

MC Corbett v. Ipoh Tin Dredging Ltd [1936] 1 MLJ 222 ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Raja Abdullah Wahman Raja Sulaiman & Anor v. Toplink Technologies Sdn Bhd [2003] 5 CLJ 263 HC ***(refd)***

SMO Othaman Chettiar v. Ang Gee Bok [1971] 1 MLJ ***(refd)***

Starlite Ceramic Industry Ltd v. Hiap Huat Pottery [1973] 1 MLJ 146 ***(refd)***

Union Insurance Malaysia Sdn Bhd v. Chan You Young [2003] 7 CLJ 50 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 59 r. 36(1)

For the applicant - Shankar Ram; M/s Thomas Shankar Ram & Co
For the respondent - Alvin Yong; M/s Tan Yap & Tang

Reported by Usha Thiagarajah

JUDGMENT

Lau Bee Lan J:

[1] This is both the applicant's review (encl. 175) and the respondent's review of the applicant's bill of costs (encl. 170) taxed before the learned deputy registrar *vide* certificate dated 13 June 2005 (encl. 167) pursuant to O. 59 r. 36(1) of the Rules of the High Court 1980 ("the RHC").

[2] The learned deputy registrar heard the taxation on the applicant's bill of costs made on "a party and party" basis and on 13 January 2005 allowed the applicant's bill of costs dated 22 September 2004 (encl. 136) for the amount of RM235,814.56 (inclusive of allocatur fee). The respondent being dissatisfied applied for a review of the said bill of costs before the learned deputy registrar which was dismissed, ie, the bill of costs given on 13 January 2005 was maintained with no interest on the costs. Hence the application for review by the applicant with respect to interest whilst the respondent objected basically to item 119 of the bill of costs.

[3] Basically the premise upon which the court will interfere with the decision of the taxing registrar is if it can be clearly shown that in the exercise of his discretion to award the costs, the taxing registrar has made an obvious mistake or has exercised his discretion capriciously or mischievously or there are some error of principles (See *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [2003] 7 CLJ 50, *MC Corbett v. Ipoh Tin Dredging Ltd* [1936] 1 MLJ 222, *Starlite Ceramic Industry Ltd v. Hiap Huat Pottery* [1973] 1 MLJ 146, *Ketua Pengarah Hasil Dalam Negeri v. Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374, *Chin Shui Lan v. Liow Yuan Kung @ Herman and 4 Ors.* O.S No. T(24) of 16 of 1995, High Court in Sabah and Sarawak at Tawau (Unreported)).

[4] The first ground of objection of the respondent is with respect to item 119 of the bill of costs which included getting-up costs for the inquiry (item 1) which the respondent submitted ought not to be considered as the inquiry is not a matter within the jurisdiction of the court and thus paras 1-14 of the Chronology of Events (Appendix (A)) are completely irrelevant.

[5] On the first ground, the learned deputy registrar's ruling is:

> Item 1 of the Bill of Costs includes the Applicant's attendance before the Board of Inquiry on the various dates stated therein. Paragraphs 1-14 of "Appendix A" states the Chronology of Events that took place.
>
> Learned counsel for the Applicant submits that his client is entitled to the costs because the Applicant was dismissed from service by the Respondent and the Respondent as the State Public Service Commission (PSC) knew from the beginning that they were a party to the proceedings and that the Applicant is entitled to the costs in view of the High Court order which was affirmed by the Court of Appeal and by the Supreme Court.
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> Having considered the submission by the learned counsel for the Applicant and the Respondent, I am of the view that the Applicant is indeed entitled to the costs of the getting up in item 119 which includes the getting up for the Inquiry. The reasons being that in the hearing for an order of *certiorari* in High Court Kuching of Kg. 26 of 1990, the High Court ordered that "the costs of and occasioned by this application of the Applicant be borne by the State Public Commission to the credit of Sarjit Singh Khaira (SSK) to be taxed unless Agreed". The Court of Appeal has affirmed the judgment of Kuching High Court 11, dismissed the appeal of the PSC with costs and again at the Supreme Court level, the appeal by PSC was dismissed and awarded costs in favour of SSK to the account of his taxed costs.
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> I am agreeable with the learned counsel for the Applicant in our present case that the order of costs goes back to the inception of the matter i.e. that the Notice of Motion prayed for an order of *certiorari* to quash the decision of State PSC made on 14th day of December 1988 ordering that the applicant be dismissed from the State Public Service as an Accounting Officer with effect from 1st January 1989.

[6] I am persuaded by the learned counsel for the respondent's argument that the fact that Mr. Steve Shim (as he then was) was at the material time a Sessions Court Judge does not change the character of the proceedings in that it was not before a judge but it was presided by the former sitting in his capacity as Chairman of the board of inquiry.

[7] To bolster his argument, learned counsel for the respondent cited the case of *Damansara Jaya Sdn Bhd (supra)*. In this case, (as per the headnotes), one of the respondent company's land had been compulsorily acquired by the Federal Government and compensation was made resulting in a gain over the purchase price of RM18,299,665. The Director-General of Inland Revenue ('the DG') treated the amount as income and made an additional assessment against the company amounting to RM8,576,067.95 ('the sum'). The company appealed to the Special Commissioners, who allowed the appeal. At the request of the DG, the case was stated to the High Court for review. Pending the appeal, the company secured a bank guarantee which was given to the DG *in lieu* of payment of the additional tax. The High Court, subsequently, dismissed the appeal with costs. The bill of costs was taxed by the senior assistant registrar ('the SAR') who, *inter alia*, awarded RM40,000 as getting-up fee to the company and allowed the claim of RM820,849.51 as fees paid to the bank for securing the bank guarantee. The DG and the company were dissatisfied with the getting-up fee and applied for a review. The DG also objected to the amount allowed in respect of the bank guarantee.

With regard to the review on the issue of the senior assistant registrar allowing the award of RM820,849.51 as reimbursement of the fees incurred for securing a bank gurantee, His Lordship KC Vohrah J (as he then was) held that the SAR erred. In his judgment, the learned judge held at p. 383 G to I:

> *It will be noted that statutorily, the Special Commissioners have no power to award costs after deciding on the appeal. The costs awarded by the High Court must, therefore, be in relation to the proceedings in the High Court, not in relation to the proceedings before the Special Commissioners. The fact that an appeal had been pursued before the High Court cannot bring into existence for the winning party as a right, what could not be claimed as a right before the Special Commissioners, even assuming that the DG had power to allow for a bank guarantee to be given to secure payment of the additional tax.* In any event, the DG has no such power. The DG has power if the full amount of the tax is not paid in one lump sum to allow partial payments until the whole amount is paid, and the partial payments may be made on such dates as he may determine. A bank guarantee is certainly not an instalment payment, let alone a payment. The DG in this case, had granted the company an indulgence not sanctioned by the Act. (emphasis added)

[8] Similiarly in the present case, following the judgment of KC Vohrah J (as he then was) in *Damansara Jaya Sdn Bhd (supra)* with which I agree, it means that the applicant would not be entitled to costs before the board of inquiry as costs awarded in the High Court must be in relation to the proceedings in the High Court. Hence to this extent, I am of the view that the learned deputy registrar erred when she stated that the applicant is entitled to "getting up for the inquiry", since the "order of costs goes back to the inception of the matter ie, that the notice of motion for an order of *certiorari* to quash the decision of the PSC made on 14 December 1988 ordering that the applicant be dismissed from the State Public Service as an accounting officer with effect from 1 January 1989".

[9] Be that as it may, it is to be observed that item 119 of the bill of costs, *inter alia*, states "receiving and or taking further detailed instruction from client **considering/perusing all the notes of proceedings and exhibits tendered at the board of inquiry chaired by Mr Steve Shim** (which require several times attentive reading)". (emphasis added).

[10] It is to be observed that the notes of proceedings before the board of inquiry consisted 64 pages covering over a 12 days' period of sitting; the prosecution filed more than 29 exhibits and made 24 pages written submissions and a reply whilst the defendants filed more than 145 exhibits and 16 pages of written submission and a reply.

[11] Thereafter followed the various actions comprising:

i. OM KG. 16 of 1989 – for leave to apply for an order of *certiorari* to quash the decision of the Public Service Commission was filed on 4 February 1989; leave granted; costs in the cause.

ii. OS KG. 275 of 1989 – application for extension of time for the same as (i) above filed on 8 December 1989; extension granted; costs be in the cause.

iii. OM KG. 26 of 1990 – application for an order of *certiorari* to quash the decision of the State Public Service Commission made on 14 December 1988 which dismissed the applicant from the State Civil Service w.e.f 1 January 1989, filed on 12 December 1990; after 16 days of hearing, on 7 February 1992

the said motion was dismissed by Dato' Hj. Abdul Kadir Sulaiman JC (as he then was) on the sole ground the State Public Service Commission was not a party to the proceedings; costs were awarded to the Government to be taxed unless agreed but the applicant was successful before the Supreme Court which allowed the applicant's appeal and ordered the High Court to continue with the hearing of the substantive motion and that the notice of motion be served on the State Public Service Commission.

iv. The continued hearing before the same Honourable JC proceeded between 6 December 1994 to 7 July 1995 (seven days) wherein parties filed numerous detailed affidavits; the Honourable JC on 7 July 1995 decided in favour of the applicant and ordered the costs of and occasioned by this application of the applicant be borne by the State Public Service Commission to the credit of the applicant to be taxed unless agreed.

v. On 16 January 1999 the Court of Appeal affirmed the judgment of the High Court and dismissed the appeal of the State Public Service Commission with costs to be taxed. The applicant submitted 100 hours time was spent in detailed research work and on defending the appeal by the State Public Service Commission.

vi. On 6 July 2000 the Federal Court dismissed the appeal of the State Public Service Commission and awarded costs in favour of the applicant to the account of his taxed costs.

[12] I find that the learned deputy registrar was mindful of the absence of a "time sheet" which the learned counsel for the defendant mooted had to be kept relying on the case of *Chin Shui Lan v. Lio Yuan Kung @ Herman & 4 Ors*, O.S. No. T(24) 16 of 1995 (Unreported), decision of Ian Chin J who relied on *SM.O Othaman Chettiar v. Ang Gee Bok* [1971] 1 MLJ. In *SM.O Othaman Chettiar*'s case there was a claim by a moneylender for the repayment of $4,000 alleged to have been loaned by him to the defendant on the security of a promissory note and agreed interest. The sum of $400 only was admitted as having been received and it was alleged that this sum was not handed to the defendant in the presence of the solicitor who attested the pro-

note at the time of execution. In the cause of the trial, another attorney testified and he could not recall the transaction at all. It was in this context that His Lordship Datuk Chan Min Tatt J (as he then was) made the following observation at p. 91 D-E:

> Apparently this solicitor did not appreciate the clear advantages of keeping written aide-memoires of attendances on clients and other parties, to which he could make reference by way of refreshing his memory to recall the events of any particular transaction. *Attendance-slips as they are usually called in the profession must be seen to be of the utmost importance not only in recalling past events to mind but also for purposes of taxation of costs.* It is, I realise, not part of my duty nor should it be my presumption to advice solicitors on how they should or should not carry out their work but I would venture, with some diffidence, to suggest that solicitors would do well to bear in mind the possibility of their being called to the witness stand. In this particular instance, the solicitor not only did not keep any attendance-slip but also did not use the pro-note beyond identifying his signature which was on it, to refresh his memory. He, as I noted, categorically stated that he could not recall anything about this particular transaction. (emphasis added)

In my view, although it would have been ideal if a time sheet or "attendance-slips" are kept, a time sheet is not compulsory and the fact that no time-sheet was prepared does not detract from the fact that time was spent on in getting up for the various actions which I have itemised above as can be gleaned from the chronology of events which the learned deputy registrar had given due regard thereto.

[13] I find that the learned deputy registrar did not err when she considered that there were many complicated issues of both facts and law involving extensive legal research and stated that complexity of the matter was confirmed by the Deputy State Attorney-General as per his letter dated 28 March 1989 (exh. A1 to the notice of taxation). The learned counsel for the respondent submitted that exh. A1 is about Kuching High Court Originating Motion No. KG. 4 of 1989 and related to amendment and the applicant's counsel's submission was speculative. I am in agreement with the counsel for the applicant that although the case no. cited in exh. A1 is not the same suit but it is inter-connected with the present application for an order of *certiorari*.

[14] The applicant urged the court grant statutory interest from the date of judgment till full and final settlement and cited the case of *Lian Kim Lian v. Bajuria* [1971] 1 MLJ 276 and *Raja Abdullah Wahman Raja Sulaiman & Anor v. Toplink Technologies Sdn. Bhd.* [2003] 5 CLJ 263.

In rebuttal, learned counsel for the respondent cited *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn. Bhd.* [1999] 3 CLJ 577. His Lordship Gopal Sri Ram JCA joined "It is well settled that the power to award or refuse interest is one of pure discretion". In this connection I am inclined to agree with submission made on behalf of the respondent that by virtue of the letter dated 22 May 2003 addressed to Mr. T.O Thomas by the applicant complaining that the former was incompetent and had been negligent in not filing the notice of taxation for eight years and therefore any award of interest would condone such complaint. In the circumstances I find that the learned deputy registrar had exercised her discretion judiciously in not awarding interest.

[15] For the foregoing reasons, both the applicant's and the respondent's applications for review are dismissed with no order as to costs.